



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Theodore W. Meyers)
)
APPLICATION NO.: 09/652,927)
) EXAMINER: Lugo
FILED: August 31, 2000)
) ART UNIT: 3676
FOR: TEE BAFFLE FOR USE AT)
INLET OR OUTLET OF SEPTIC)
AND OTHER ON-SITE WASTE)
DISPOSAL SYSTEMS)
)

THIRD AFFIDAVIT OF THEODORE W. MEYERS UNDER 37 CFR §1.132

I, Theodore W. Meyers, hereby swear as follows:

1. I am the founder and President of Tuf-Tite, Inc. ("Tuf-Tite"), the Assignee of United States Patent Application No. 09/652,927, entitled "TEE BAFFLE FOR USE AT THE INLET OR OUTLET OF SEPTIC AND OTHER ON-SITE WASTE SYSTEMS," and I am also the sole inventor thereof.

2. I have reviewed the Office Action mailed October 20, 2004, and the prior art references on which the rejections under 35 U.S.C. §§ 102, 103 are based.

3. One purpose of this Third Affidavit is to respond to arguments raised in the Office Action mailed October 20, 2004 that my previous two Affidavits in this application were not considered persuasive. Another purpose of this Third Affidavit is to present yet additional consistent evidence of secondary considerations of non-obviousness which, by itself or in combination with the evidence of non-obviousness submitted with my November 26, 2002 and August 6, 2003 Affidavits, is more than sufficient to rebut the obviousness rejections under 35 U.S.C. § 103 of claims 2, 6, 15-18, and 20-22 in the Office Action mailed October 20, 2004.

Additional Evidence of Secondary Considerations of Non-Obviousness

- Commercial Success

4. Since August 1, 2003, which is the date of the sales history report attached to my Supplemental Affidavit of August 6, 2003, sales of TB-4 T-Baffle tees have continued to accelerate.

5. Attached at Tab 1 to this Third Affidavit is a sales report entitled "Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK," which is a true and accurate thirty-six month record of the sales volume for the TB-4 T-Baffle tees sold by Tuf-Tite covering the time period from March 1, 2002 through February 28, 2005.

6. As indicated in the sales report attached at Exhibit A of my August 6, 2003 Supplemental Affidavit, during the time period from March 1, 2001 through February 28, 2002, Tuf-Tite sold a total of 43,198 TB-4 T-Baffle tees. As indicated in the sales report attached at Tab 1, during the time period from March 1, 2002 through February 28, 2003, Tuf-Tite sold a total of 55,144 TB-4 T-Baffle tees; during the time period from March 1, 2003 through February 27, 2004, Tuf-Tite sold a total of 67,638 TB-4 T-Baffle tees; and during the time period from March 1, 2004 through February 28, 2005, Tuf-Tite sold a total of 99,531 TB-4 T-Baffle tees, for a total during the forty-eight month period from March 1, 2001 through February 28, 2005 of 265,511 TB-4 T-Baffle tees. A very small percentage of these tees, less than 1%, were free samples.

7. Attached at Tab 2 to this Affidavit is a bar chart graphically depicting the dramatic increase in sales of the TB-4 T-Baffle tees in the years 2001-2004, based on the sales data shown in Exhibit A of my Supplemental Affidavit of August 6, 2003 and Tab 1 of this Affidavit.

8. As independent products, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are all covered by at least claims 2, 6, 15, 16, 21 and 22 of the present patent application.

9. When used in conjunction with effluent filters, such as the Tuf-Tite EF-4 effluent filter, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are additionally covered by claims 16 and 20.

10. When used in combination with a length of pipe received in the inlet/outlet hub, such as a pipe that may carry effluent away from a septic tank and out toward a leach field, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented in the sales reports attached to this and my prior Affidavits in this application are covered by claim 17.

11. When used in combination with a reducer bushing between the inlet/outlet hub and a length of pipe received in the inlet/outlet hub, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are covered by claim 18.

12. Attached at Tab 3 to this Affidavit is a sales report entitled "Sales History for EF-4, 4" Effluent Filter," which is a true and accurate thirty-six month record of the sales volume for the EF-4 effluent filter sold by Tuf-Tite covering the time period from March 1, 2002 through February 28, 2005. A very small percentage of these effluent filters, less than 1%, were free samples.

13. Attached at Tab 4 to this Affidavit is a sales report entitled "Sales History for EF-4, 4" EFFLUENT FILTER", which is a true and accurate fourteen-month record of the sales volume for the EF-4 effluent filter sold by Tuf-Tite covering the time period from January 1,

2001 through February 28, 2002. A very small percentage of these effluent filters, less than 1%, were free samples.

14. The EF-4 effluent filter, which is the subject of my U.S. Patent Nos. D431,629 and 6,319,403 (which patents are assigned to Tuf-Tite) is intended for use in the TB-4 T-Baffle tee.

15. It would have been my expectation that sales growth of the EF-4 effluent filter would have tracked closely with sales growth of the TB-4 T-Baffle tee.

16. Because TB-4 T-Baffle tees may be used at the inlet or outlet of a septic tank, and the EF-4 effluent filter is used only at the outlet of septic tanks, it would have been my expectation that, at most, sales of the TB-4 T-Baffle tees in a particular year would be double sales of EF-4 effluent filters.

17. Attached at Tab 5 to this Affidavit is a bar chart graphically depicting a comparison between the accelerating sales of the TB-4 T-Baffle tees from March 1, 2001 to February 28, 2005, with the relatively linear growth of sales of the EF-4 effluent filters in the same time period.

18. Contrary to my expectations, as depicted in the bar chart at Tab 5, sales of the TB-4 T-Baffle tees have increased at a much faster rate than sales of the EF-4 effluent filter.

19. Also contrary to my expectations, as depicted in the bar chart at Tab 5, in the period from March 1, 2004-February 28, 2005, sales of the TB-4 T-Baffle tees were substantially more than double sales of the EF-4 effluent filter. Specifically, 39,295 EF-4 effluent filters, as compared to 99,531 TB-4 T-Baffle tees.

20. The strong sales of the TB-4 T-Baffle tees are due to the claimed features of the tee, including: a wall thickness between 0.075" and 0.100" over a substantial portion of an

elongated generally cylindrical main body portion; an inlet/outlet hub of an inlet/outlet port, such inlet/outlet hub having a diameter sized to receive a pipe of a first outer diameter (e.g., Schedule 40 pipe) and being adaptable to receive a pipe of a second outer diameter (e.g., SDR-35 pipe), and the diameter of the inlet/outlet hub being greater than the diameter of the elongated main body portion.

21. I know of no other reason, except for the claimed features noted above and the cost savings realized by those claimed features which are passed along to customers, to account for such dramatic sales. For example, the TB-4 T-Baffle tees have not been advertised or marketed in a manner, or at any level, differently from any of the numerous other on-site waste system and related component products sold by Tuf-Tite. Based upon my experience in the industry, including as to marketing and advertising by Tuf-Tite and by others, it is my view that the level of marketing and advertising spent on the TB-4 T-Baffle tees since their introduction would not generate the growth and level of sales experienced in 2001-2004.

22. I have read in the Office Action mailed October 20, 2004 the statements that “the applicant fails to explain why the sales increase. Also, the applicant fails to demonstrate his invention with respect to the devices that are in the market.”

23. As I best understand these statements, there is an alleged shortcoming in my prior Affidavits in this application on the basis that I have not sufficiently shown how the increase in sales of the Tuf-Tite TB-4 T-Baffle tees compares to sales of other products in the market. However, when one considers the types of products that the TB-4 T-Baffle tee replaces, it is readily appreciated that data concerning sales of such other products would not be useful to demonstrate the remarkable commercial success of the TB-4 T-Baffle tee. More specifically, as discussed in the “Background” section of my present patent application, “[o]lder concrete septic

systems utilized cast-in concrete baffles at the inlet and outlet of the system.” (P. 1). An alternative has been the use of “standard tees or sweep tees manufactured *primarily* for use in plumbing applications, such as for pipe joints or couplings.... [and] a length of PVC pipe cut down to fit one end of the available plumbing tees, and of sufficient length to cover the sealing gasket used with many of the known single-pass effluent filters.” (Pp. 2, 4) (emphasis added).

24. Even if sales data from the period 2001-2004 for such conventional cast-in concrete baffles, plumbing tees, and lengths of PVC pipe were available, these products have such a myriad of uses in plumbing and other fields, other than at the inlet or outlet of septic tank systems, that a comparison of sales with the Tuf-Tite TB-4 T-Baffle tees would, respectfully, be meaningless and not helpful toward determining whether there has been commercial success of the Tuf-Tite TB-4 T-Baffle.

25. What is remarkable about the sales growth of the Tuf-Tite TB-4 T-Baffle tee has been the widespread and ever-growing acceptance and interest in the Tuf-Tite TB-4 T-Baffle tee, i.e. as a low-cost, labor-saving, quickly-installed alternative to products or structures that are primarily intended for other purposes, but which nevertheless had been the standard for housing effluent filters used at the outlet of septic tanks or for directing flow of wastewater into septic tanks at the inlet.

- **Copying By Others**

26. My previous affidavits presented evidence of copying of the patentable and claimed features of the TB-4 T-Baffle tee by Zabel, Inc., a competitor of Tuf-Tite.

27. Since Tuf-Tite’s introduction of the TB-4 T-Baffle tee, another competitor of Tuf-Tite has introduced a filter housing which incorporates many of the claimed features of the tee baffle of my present patent application.

28. Attached at Tab 6 is an excerpt of the 2005 catalog of Polylok, Inc. ("Polylok"), advertising a housing for use at the inlet or outlet of septic tanks, and the cover of that 2005 catalog.

29. On page 68 of the Polylok 2005 catalog, in a graphic box containing a picture of the housing, is the following text:

"NEW TEE/BAFFLE

- Can be used on either inlet or outlet.
- Easy to install
- Accepts 3", 4", SCHD 40 and SDR 35 pipe
- Accepts most 4", effluent filters

Patent Pending"

30. Attached at Tab 7 is a series of digital photos of the Polylok, Inc. housing, which is designated the "PL-68 tee", and which is available as Part No. 30142-68.

31. The Polylok PL-68 tee is a tee for use at the inlet or outlet of a septic tank.

32. The Polylok PL-68 tee has an elongated, generally cylindrical injection molded plastic main body portion defining a tubular opening, and the tubular opening is adapted to receive a filter.

33. The Polylok PL-68 tee has a cylindrical injection molded plastic uppermost hub coaxial with the elongated main body portion, and the uppermost hub has an inner diameter greater than the diameter of the elongated main body portion.

34. The Polylok PL-68 tee has an inlet/outlet port in communication with the tubular opening, the inlet/outlet port having an inlet/outlet hub at an open end thereof, and the inlet/outlet hub has a diameter sized so as to receive a pipe of a first outer diameter.

35. The inlet/outlet hub of the Polylok PL-68 tee is also adapted to receive a pipe of a second outer diameter, by virtue of an integral nested cylindrical portion extending coaxially with, and located within, the inlet/outlet hub.

36. The diameter of the inlet/outlet hub of the Polylok PL-68 tee is greater than the diameter of the elongated main body portion.

37. Polylok, Inc. did not develop the Polylok PL-68 tee until long after Tuf-Tite released the TB-4 Tee Baffle.

38. Sometime after December 20, 2000, but before Polylok released the Polylok PL-68 tee, Polylok expressed interest to Tuf-Tite in purchasing large quantities of TB-4 T-Baffle tees from Tuf-Tite, but Tuf-Tite was not willing to sell large quantities of TB-4 T-Baffle tees to its competitor.

39. Tuf-Tite has still not sold any T-Baffle tees to Zabel, Inc. since December 20, 2000.

Conclusion

40. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under the laws of the United States of America, and that such willful false statements and the like may jeopardize the validity of the application or of any patent(s) resulting therefrom, declares that all statements made of his knowledge are true; that all statements made on information and belief are believed to be true, and that each of the attached documents is a true and accurate copy of what it purports to represent.

March 21, 2005

/Theodore W. Meyers/
Theodore W. Meyers
Inventor & President,
Tuf-Tite, Inc.

Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK

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Pds Past	End Date	Qty	Sls
36	03/29/02	2,975	
35	04/30/02	4,820	
34	05/31/02	5,926	
33	06/28/02	4,522	
32	07/31/02	6,556	
31	08/30/02	5,885	
30	09/30/02	5,107	
29	10/31/02	6,357	REDACTED
28	11/30/02	3,429	
27	12/31/02	3,453	
26	01/31/03	2,939	
25	02/28/03	3,175	
Totals (36-25)		55,144	
Avgs. (36-25)		4,595.33	
24	03/31/03	3,050	
23	04/30/03	4,847	
22	05/30/03	8,710	
21	06/30/03	5,285	
20	07/31/03	7,745	
19	08/29/03	6,144	
18	09/30/03	7,802	
17	10/31/03	7,603	
16	11/26/03	5,266	
15	12/31/03	3,654	
14	01/30/04	4,355	
13	02/27/04	3,177	
Totals (24-13)		67,638	
Avgs. (24-13)		5,636.50	
12	03/31/04	8,451	
11	04/30/04	7,085	
10	05/28/04	9,242	
9	06/30/04	8,749	
8	07/30/04	11,696	
7	08/31/04	9,354	
6	09/30/04	8,696	
5	10/31/04	7,809	
4	11/30/04	8,599	
3	12/30/04	8,265	
2	01/31/05	5,992	
1	02/28/05	5,593	
Totals (12- 1)		99,531	
Avgs. (12- 1)		8,294.25	
Totals (36- 1)		222,313	
Avgs. (36- 1)		6,175.36	

Sales History for EF-4, 4" EFFLUENT FILTER

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Pds Past	End Date	Qty	Sls
36	03/29/02	1,740	
35	04/30/02	2,183	
34	05/31/02	3,238	
33	06/28/02	1,784	
32	07/31/02	3,023	
31	08/30/02	3,221	
30	09/30/02	2,519	
29	10/31/02	2,841	
28	11/30/02	1,293	
27	12/31/02	1,986	
26	01/31/03	1,993	
25	02/28/03	1,427	
Totals (36-25)		27,248	
Avgs. (36-25)		2,270.67	
24	03/31/03	1,791	
23	04/30/03	3,265	
22	05/30/03	4,797	
21	06/30/03	2,644	
20	07/31/03	3,350	
19	08/29/03	3,285	
18	09/30/03	3,748	
17	10/31/03	3,851	
16	11/26/03	2,147	
15	12/31/03	2,564	
14	01/30/04	2,260	
13	02/27/04	1,352	
Totals (24-13)		35,054	
Avgs. (24-13)		2,921.17	
12	03/31/04	3,877	
11	04/30/04	3,422	
10	05/28/04	3,602	
9	06/30/04	2,842	
8	07/30/04	3,095	
7	08/31/04	4,307	
6	09/30/04	4,022	
5	10/31/04	3,284	
4	11/30/04	4,058	
3	12/30/04	2,566	
2	01/31/05	2,907	
1	02/28/05	1,313	
Totals (12- 1)		39,295	
Avgs. (12- 1)		3,274.58	
Totals (36- 1)		101,597	
Avgs. (36- 1)		2,822.14	

Sales History for EF-F, 4" EFFLUENT FILTER

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Pds Past	End Date		Qty Sales	
50	01/31/01		2,350	
49	02/28/01		1,701	
48	03/31/01	REDACTED	1,221	REDACTED
47	04/30/01		1,738	
46	05/31/01		3,449	
45	06/30/01		1,246	
44	07/31/01		2,402	
43	08/31/01		2,610	
42	09/30/01		1,774	
41	10/31/01		1,007	
40	11/30/01		1,759	
39	12/31/01		1,161	
38	01/31/02		1,860	
37	02/28/02		2,056	